SUPREME COURT- STATE OF NEW YORK

PRESENT: *Honorable James P. McCormack*
Justice
_____x

ODED MARKEL,

TRIAL/IAS PART 18
NASSAU COUNTY

Plaintiff(s)

-against-

Index No.: 601900/18

Motion Seq. 003
Motion Submitted: 8/21/2020

MAURIZIO NICOLOSI,

Defendant(s)
_____x

The following papers read on these motions:

Notices of Motion/Supporting Exhibits.....X
Affirmation in Opposition/Supporting Exhibits.....X
Reply Affirmation.....X

Defendant, Maurizio Nicolosi (Nicolosi), moves this court for an order granting him summary judgment and dismissing the complaint against him based on Plaintiffs' injuries not meeting the "serious injury" threshold of Insurance Law §5102. Plaintiff, Oded Markel (Markel), opposes the motion.

Markel commenced this action by summons and complaint dated February 7, 2018. Issue was joined by service of an answer dated March 14, 2018. The case certified ready for trial on December 18, 2018, and a note of issue was filed on November 21, 2019

This matter involves a motor vehicle accident during which Markel alleges he suffered injuries when Nicolosi went through a red light. Nicolosi now moves for summary judgment arguing Markel's injuries do not meet the serious injury threshold.

In seeking summary judgment, Nicolosi relies upon, *inter alia*; the pleadings; the bill of particulars; Markel's deposition transcript; the emergency room records of Nassau University Medical Center; and the affirmed medical reports of Dr. John C. Killian, an orthopedic surgeon who examined Markel as part of an Independent Medical Examination (IME) on January 16, 2019.

"Serious injury" is defined in Insurance Law § 5102(d) as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The issue of whether a claimed injury falls within the statutory definition of serious injury is, in the first instance, a question of law for the court which may be decided on a summary judgment motion *(Licari v. Elliot*, 57 N.Y.2d 230, 237 [1982]; *Carter v. Adams*, 123 A.D.3d 967, 967 [2nd Dept. 2014]). A defendant seeking summary judgment based on a lack of serious injury bears the initial burden of establishing that plaintiff did not sustain a serious injury as defined in Insurance Law § 1502 (d). (*Gaddy v. Eyler*, 79 N.Y.2d 955, 956-57 [1997]; *Young Mi Hwang v. Vasconex-Vallejo*, 124 A.D.3d 769, 769 [2nd Dept. 2015].

As a proponent of the summary judgment motion, Nicolosi had the initial burden of establishing that Markel did not sustain causally related serious injuries under the permanent loss of use of a body organ, member, function or system, significant limitation of use of a body function or system and 90/180-day categories (*see Toure v Avis Rent a Car Sys.*, 98 N.Y.2d 345, 352 [2002]). Evidence submitted in support of a motion for summary judgment must be in admissible form. (*Pagano v. Kinsbury*, 182 A.D.2d 268, 270 [2nd Dept. 1992]. A defendant can satisfy the initial burden by relying on either the sworn statements of defendant's examining physician, or plaintiff's sworn testimony or the unsworn reports of plaintiff's own examining physicians (*Id.*). A defendant can demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the alleged injuries were not, in any event, causally related to the accident (*Franchini v Palmieri*, 1 N.Y.3d 536, 537 [2003]).

In support of summary judgment, a defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, the expert must compare any findings to those ranges of motion considered normal for the particular body part (*Browdame v. Candura*, 25 AD3d 747, 748 [2nd Dept. 2006]). Further, "[t]he mere existence of a bulging or herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (*Rivera v Bushwick Ridgewood Props. Inc.*, 63 AD3d 712 [2nd Dept. 2009]; *Smeja v Fuentes,* 54 AD3d 326 [2nd Dept. 2008]. Once the defendant has made the required showing, the burden shifts to plaintiff to rebut the presumption that there is no issue of fact as to the threshold serious injury question. (*Franchini v. Palmieri, supra*).

At the time of the IME, Markel complained of lower back pain. Dr. Killian performed range of motion testing using a goniometer and relying on the America Medical Association "Guidelines to the Evaluation of Permanent Impairment" Fifth Edition, as his basis for "normal" findings. He found normal ranges of motion in the cervical spine. Markel did complain of pain at the extremes of rotation and lateral flexion. Other testing was normal. Neurological testing was also normal. After reviewing the emergency room records, Dr. Killian noted that CT scan taken showed signs of degenerative disc disease. Based upon his examination, Dr Killian opined:

> The examination of his cervical and thoracic spine was entirely normal without subjective or objective findings. This confirms his lack of complaints about those areas. The examination of his lumbar spine was remarkable for complaints of tenderness and pain at the extremes of motion which were unaccompanied by objective findings including restricted motion or muscle spasm. The sciatic nerve tension signs were negative. The lower extremity neurological examination was remarkable for subjective sensory changes over the left leg which were unaccompanied by objective findings including reflex alterations, weakness or atrophy.
>
> Based on this examination I would conclude that Mr. Markel has recovered fully from all alleged injuries from the 8/28/17 accident. There were no positive objective findings to confirm his subjective complaints. He has no impairment or disability from injuries from this accident. He is able to work at normal capacity and perform all of his usual activities without restrictions from problems caused by injuries from this accident.

Based upon the emergency room records and the report of Dr. Killan, the court finds that Nicolosi has established entitlement to summary judgment as a matter of law. Dr. Killian found normal ranges of motion and no objective evidence to support the subjective complaints of pain. The burden shifts to Markel to raise an issue of fact requiring a trial of the action.

To do so, Markel must demonstrate, by the submission of objective proof of the nature and degree of the injury, that she sustained a serious injury or there are questions of fact as to whether the purported injury, in fact, is serious (*Perl v Meher,* 18 N.Y.3d 208, 218-219 [2011]).

To satisfy the statutory standard for serious injury, a plaintiff must submit objective and admissible proof of the duration of the alleged injury, and the extent or degree of the limitations associated with the alleged injury. (*Rovelo v. Volcy*, 83 A.D.3d 1034, 1035 [2nd Dept 2011]). Neither subjective complaints of pain nor a self-serving affidavit of the plaintiff are sufficient to meet this requirement. (*Toure v Avis Rent A Car Sys., Inc., supra; Scheer v Koubek*, 70 N.Y.2d 678, 679 [1987]).

A plaintiff cannot defeat a motion for summary judgment, and successfully rebut a *prima facie* showing that she did not sustain a serious injury, merely by relying on documented subjective complaints of pain (*Uddin v Cooper*, 32 A.D.3d 270, 271 [1st Dept. 2006] *lv to appeal denied* 8 N.Y.3d 808 [2001]). Plaintiff must come forth with objective evidence of the extent of alleged physical limitation resulting from injury and its duration. That objective evidence must be based upon a recent examination of the plaintiff (*Sham v B&P Chimney Cleaning & Reprair Co., Inc.*, 71 A.D.3d 978 [2nd Dept. 2010]) and upon medical proof shortly after the subject accident (*Perl v Meher, supra*).

"[E]ven when there is medical proof, when additional contributory factors interrupt the chain of causation between the accident and the claimed injury – such as a gap in treatment, an intervening medical problem or a pre-existing condition – summary dismissal of the complaint may be appropriate" (*Pommells v Perez,* 4 N.Y.3d 566, 572 [2005]). Whether a limitation of use or function is significant or consequential relates to medical significance and involves a comparative determination of the degree or

qualitative nature of an injury based on the normal function, purpose and use of a body part (*Dufel v Green*, 84 N.Y.2d 795, 798 [1995]).

To prove the extent or degree of physical limitation with respect to the limitation of use categories, either objective evidence of the extent, percentage or degree of the limitation, or loss of range of motion and its duration, based on a recent examination, must be provided or there must be a sufficient description of the qualitative nature of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part or system (*Perl v Meher, supra; Estrella v Geico Ins. Co.*, 102 A.D.3d 730, 731 [2nd Dept. 2013). A mild, minor or slight limitation of use is considered insignificant within the meaning of Insurance Law §5102(d) (*Il Chung Lim v Chrabaszcz*, 95 A.D.3d 950, 951 [2nd Dept. 2012]).

Further, in order to defeat a summary judgment motion, a plaintiff's opposition, "to the extent that it relies solely on the findings of the plaintiff's own medical witnesses, must be in the form of affidavits or affirmations, unless an acceptable excuse for failure to comply with this requirement is furnished." *(Pagano v. Kinsbury*, 182 A.D.2d at 270, *supra*).

Once a plaintiff establishes proof that an injury meets at least one category of the no-fault threshold, it is unnecessary to address whether the plaintiff's proof in regard to other alleged injuries is sufficient to defeat defendant's *prima facie* showing (*Linton v Nawaz*, 14 N.Y.3d 821, 822 [2015]).

In opposition to the motion, Markel submits, *inter alia*, the affirmation and reports of Joseph Gregorace D.O., the affirmation of reports of Dr. Robert Diamond, radiologist, the Affirmation and reports of James M. Liguori, D.O., the unaffirmed report of Dr. Victor Katz, orthopedic surgeon and Markel's affidavit.

Dr. Gregorace first examined Markel on September 8, 2017, less than two weeks after the accident. During that examination, Dr. Gregorace found, using a goniometer, diminished range of motion in flexion (20%), extension (17%), right rotation (25%) and left rotation (20%). There were more significant limitations in range of motion of the thoracolumbar spine, including a 34% loss in flexion, extension, and straight leg bending. Dr. Gregorace examined Markel again on October 6, 2017, October 27, 2017, November 10, 2017, December 1, 2017, January 5, 2018, February 16, 2018, March 2, 2018, April 11, 2018, May 23, 2018, July 18, 2018, August 31, 2018, October 19, 2018, January 16, 2019, April 3, 2019, May 17, 2019, July 17, 2019, and February 26, 2020. Markel also saw Dr. Visram from the same practice throughout this time. During each visit, Dr Gregorace noted significant limitations in range of motion for the lumbar spine, as well as other infirmities. Further, Dr. Gregorace attributes the injuries to trauma suffered during the accident.

The court finds that Dr. Gregorace's affirmation and reports raise an issue of fact. Dr. Gregorace found significant limitations of range of motion soon after the accident, and in a recent evaluation in February 2020, along with numerous other examinations. As an issue of fact exists for one category of the no-fault threshold, the court need not

determine whether the other alleged injuries meet the threshold. (*Chul Koo Jeong v. Denike*, 137 AD3d 1189 [2d Dept 2016]).

Accordingly, it is hereby

ORDERED, that Nicolosi's motion for summary judgment is DENIED in its entirety.

The court has considered the remaining contentions of the parties and finds them to be without merit.

This constitutes the decision and order of this court.

Dated: October 20, 2020
Mineola, N.Y.

ENTERED
Oct 26 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Hon. James P. McCormack, J. S. C.